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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 278

HARRY NEEDELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 146–153) is reported at 261 F. 2d 802.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1958 (R. 153). A petition for rehearing was denied on July 6, 1959 (R. 157). The petition for a writ of certiorari was filed on August 4, 1959, and granted on October 12, 1959, 361 U.S. 808 (R. 157). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

her a government agent's notes of an inter-
made part of government files or communi-
nyone, fall within the reach of 18 U.S.C.

her the trial judge, in his discretion in the
ces of this case, could properly deny pro-
the notes as papers used to refresh the
collection before trial.
her the denial of the request for production
licial where the substance of the notes was
lable through the agent's statement in the
, prepared from the notes, which was given
nse,

STATUTE INVOLVED

J.S.C. 3500 provides:
a) In any criminal prosecution brought by
United States, no statement or report in
possession of the United States which was
le by a Government witness or prospective
ernment witness (other than the defendant)
an agent of the Government shall be the
ject of subpena, discovery, or inspection
il said witness has testified on direct exam-
tion in the trial of the case.
b) After a witness called by the United
ites has testified on direct examination, the
rt shall, on motion of the defendant, order
United States to produce any statement
hereinafter defined) of the witness in the
session of the United States which relates
the subject matter as to which the witness
testified. If the entire contents of any such

statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * * *

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

On October 18, 1955, an indictment was returned in the United States District Court for the Southern District of Florida charging that petitioner and one Waxman conspired to sell narcotic drugs, not pursuant to written orders, in violation of 26 U.S.C. 4705(a) (R. 1). Proceedings on this charge terminated in a mistrial (R. 147). On October 2, 1957, a second indictment was filed against petitioner alone charging him with 15 substantive violations (in August 1955) of 26 U.S.C. 4705(a) (R. 2–8).

On the government's motion these two indictments were consolidated for trial (R. 9–10), and on November 19, 1957, the jury found petitioner guilty on each

of the fifteen substantive counts (R. 12).[1] The trial court then granted petitioner's motion for a new trial on counts 11 through 15 (R. 12–14), and upon the government's motion dismissed these counts (R. 15–16, 18).

On counts 1 through 10, petitioner was sentenced to pay a fine totalling $5,000 ($500 on each count), and to two years' imprisonment on each count, to run concurrently. The sentence of imprisonment was suspended and petitioner was placed on probation for three years (R. 14–15; 16–18).

The court of appeals unanimously affirmed, finding: (1) that the evidence supported the jury verdict, and (2) that the trial judge committed no error in denying petitioner's demand for production of the personally-prepared "work notes" of narcotic agent Rudd who was a government witness.

1. The pertinent evidence may be summarized as follows:

Shortly before departing for a seven-week European vacation on August 6, 1955 (R. 102–103), petitioner, a licensed physician practicing in Miami Beach, Florida, left more than 130 signed prescriptions for codeine, methadon and demerol (all narcotic drugs (R. 10–11)), to be delivered during his absence to some seven persons, including Miller, Garcia, and Buonauto, the three persons named as the purchasers in the substantive indictment. Some of these prescriptions were left by petitioner in his office, and

[1] On November 18, 1957, after the conclusion of the government's case, the trial court granted defendants' motion for a judgment of acquittal on the conspiracy charge (R. 11).

others (for one Abe Bruches and his wife (R. 36–37, 69, 76)) were left in the Medical Arts Pharmacy, the drugstore owned by petitioner's co-defendant (Waxman). Misses Rossman and Fredericks, petitioner's office assistants during this period (named but not indicted as co-conspirators under the conspiracy charge), testified to the arrangements made by petitioner for the delivery of, and payment for, these narcotics prescriptions during his absence and the procedures that they followed pursuant to his directions. Before he left, petitioner had instructed them that all the narcotics prescriptions were to be kept locked in a desk drawer, and that a prescription was to be delivered to the person in whose name it was issued when that person came in and paid a prescribed fee of $5 or $10. Each time one of these prescriptions was delivered, the office assistants were to, and did, write in the date of delivery next to the words "to be filled"—words previously written on the prescriptions by Miss Rossman (R. 23–26, 30–33). The fees received were entered in the "day book" and locked in the desk drawer (R. 24).

Miss Rossman, who identified some fifty-six prescriptions as containing her handwriting (R. 21, 26), further testified that, when she delivered a prescription during petitioner's absence, the recipient would not necessarily see or have any conversation with anyone else in the office and that the normal office procedure was "done away' with." Hence, if these persons come in solely for prescriptions, no treatment cards were pulled nor were they sent in to the doctor who was taking care of petitioner's practice during

his absence; they would see only her (R. 25, 27). Miss Fredericks, who identified some twenty-nine prescriptions (R. 31), similarly stated that when Fidel Garcia came in for a prescription during this period he would not, on most occasions, talk to a doctor, but only to her (R. 32).[4]

Two pharmacists (Miss Sachs and Mr. Komisarow)[5] testified concerning the 70-odd narcotic prescriptions deposited by petitioner at the Medical Arts Pharmacy for Abe Bruches and his wife (R. 34, 36–37, 151–152). Their testimony was that these prescriptions were kept in a safe (R. 37); and were dated and filled in by a pharmacist when the Bruches came in and requested them (R. 35–37, 40–49, 52–53). The Bruches would come in on the average of once a day for the prescribed drugs (R. 50). Miss Sachs further testified that the Bruches paid her $2 for the pills and that the money was placed in a separate envelope in the safe (R. 37–38). Mr. Komisarow stated that the Bruches paid a "fee for the prescription itself," and at different times left money at the drug store which, as he understood, was to pay off a past debt to petitioner (R. 41). When petitioner returned from his vacation,

[4] Since Dr. Szekely, who was to take over petitioner's practice during his vacation, had not received his state license to practice at the time of petitioner's departure, petitioner arranged that Dr. Grier (a licensed physician with a government narcotic license) also be in the office. Dr. Szekely obtained his license two weeks after petitioner had left, and thereafter ran the practice alone until petitioner's return (R. 30, 70–78, 104–106, 108). Neither Dr. Grier nor Dr. Szekely were called as witnesses.

[5] They were also named but not indicted as co-conspirators (R. 1).

he picked up the unfilled prescriptions from the drugstore (R. 49), and also collected $175 left there for him by the Bruches (R. 65–66, 98).

On September 22, 1955, two federal narcotic agents, Rudd and Waters, interviewed petitioner at his office, after procuring the prescriptions from the drug stores at which they had been filled. They testified that, upon being shown some of these prescriptions, petitioner readily admitted that he had prepared them for "those addicts" (R. 57, 97). Petitioner termed these people "old opium and heroin and morphine users" (R. 57). According to Agent Rudd, petitioner admitted that, just before he left for Europe in August 1955, he had written out these prescriptions and left them with his office girl with instructions to collect $5 or $10 for each prescription[4] (R. 56, 66–67, 69). Rudd further testified that petitioner told him that some of these people had been cured of the narcotic habit (R. 67); that, except for the Bruches, he did not think that, if withdrawn from narcotics properly, any of them would suffer ill effects other than normal withdrawal symptoms, and could be cured; that he had spoken to them about a supervised cure, but that they could not go to Lexington Hospital because of their jobs (R. 67–68). Petitioner further remarked that he thought it "wonderful" that, by

[4] As for the Bruches' prescriptions left at the drugstore, the fee was $2.50 each (R. 67–69). The reason given by petitioner why the Bruches' prescriptions were left there rather than at his office was that they would be accessible even if his office was closed (R. 69, 98). Petitioner also told Agent Rudd that the $175 collected by petitioner from the drugstore represented payment from the Bruches for these prescriptions (R. 65–66, 98).

using methadon, these persons could keep working and not have to go out on the streets to buy heroin, morphine, or a derivative. He admitted that methadon was a narcotic drug, but said it was less habit-forming than morphine and that by furnishing it he believed that he was shortening the recipient's addiction to drugs (R. 68). He said that one tablet of methadon was equivalent to "one shot" of narcotics, and that he prescribed twenty-four tablets on one prescription, "[b]ecause they told [him] they needed it" (R. 68).

Agent Waters' testimony corroborated in detail what petitioner had said to Agent Rudd at this interview (R. 97–98, 99–100). Both agents further testified that, at a subsequent interview, petitioner identified police file photographs of some of those for whom he had prescribed narcotics (R. 73). All persons receiving prescriptions, except one, were familiar to Agent Rudd in connection with his official duties (R. 79, 83–85).

Petitioner testified that the narcotics were prescribed in the course of his professional treatment of the persons receiving them (R. 106–108); that he never told his office assistants what fees to collect for the prescriptions (R. 105, 136); and that he had told Agent Rudd that these persons were not addicts (R. 122–124). He denied having any knowledge that any of these persons had ever been involved in narcotic violations (R. 126).

2. On October 17, 1957, about a month before the consolidated trial, petitioner and co-defendant Waxman joined in a motion for production and inspection of the "books, papers, documents, memoranda and

objects and particularly the contemporaneous notes made by the Government witness, Kenneth Rudd, who has previously testified * * * during his investigation and preparation for trial * * *." The motion averred that Rudd's testimony at the prior trial on the conspiracy indictment revealed that such contemporaneous notes were of events and activities related to his testimony and that inspection was necessary for preparation of the defense (R. 8–9). The motion was granted to the limited extent of allowing production of any documents or other material taken from either defendant (R. 9–10).

At the consolidated trial, on cross-examination of Agent Rudd, the following colloquy occurred between the agent and petitioner's counsel (R. 88):

> Q. You made copious notes, did you not, at the time you started the investigation of this case?
>
> A. I made several notes, yes, sir.
>
> Q. And you have refreshed your recollection from the notes that you made, refreshed your memory? Before coming to testify you refreshed your memory by reference to those notes, did you not?
>
> A. Yes, sir.

During a short recess following redirect examination of Agent Rudd, there was apparently a conversation, which is not reported, between counsel and the trial judge out of the presence of the jury. At the conclusion of the recess, but before the return of the jury, the trial judge said (R. 93):

> I will deny the request for the notes, because they may involve many things. You may see the case report.

We are advised by the United States Attorney (and petitioner does not contend the contrary) that an undeleted copy of the complete case report was handed over to petitioner's counsel. That portion which details what Agent Rudd would himself testify as to his interviews with petitioner is reproduced in full in the record at R. 138–146. The full report is signed by both Agents Rudd and Waters, and is dated October 31, 1955 (R. 138–146),* some six weeks after the agents began their active investigation of the case on September 21, 1955. It covers every aspect of the government's case including a narrative statement, a list of exhibits, and a list of prospective witnesses and their anticipated testimony.

As to Agent Rudd's prospective testimony, the report states, *inter alia,* that, when Rudd showed petitioner certain of the prescriptions, petitioner "voluntarily and spontaneously stated that he had left those prescriptions with 'those addicts' when he left for Europe. That they were all addicts and had used opium, heroin, morphine and dilaudid, that he gave it to them to keep them comfortable, and so that they could keep going and stay on their jobs and so that they would not go out on the streets looking for heroin or dilaudid" (R. 139–140). The report further states that petitioner told Rudd that he prescribed "Methadon because it would hold them

* A copy of the complete case report is on file with the Clerk of this Court.

comfortable and was the least addicting of narcotic drugs * * * [and] it was wonderful that 'those addicts' * * * were only taking Methadon and not using any heroin or dilaudid at exorbitant prices" (R. 140, 142–143). The report also recites that petitioner had said that he had discussed with the addicts the possibility of a cure at Lexington Hospital, but that they could not or would not go since they worked for a living. It also states that petitioner admitted to Rudd that he arranged to leave prescriptions with instructions as to fees at his office and at Waxman's pharmacy (R. 140–142).

SUMMARY OF ARGUMENT

I

Under 18 U.S.C. 3500(b), *supra*, pp. 2–3, after a witness has testified for the United States, the court must, on motion of the defendant, order that a "statement" of the witness relating to the subject matter of his direct testimony, in the possession of the United States, be produced for the defendant's inspection. Subsection (e) defines the term "statement" to include: (1) a written statement, "signed or otherwise adopted or approved" by the witness, or (2) a recording or transcription of a "substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

The wording of 18 U.S.C. 3500 and its enactment after this Court's decision in *Jencks* v. *United States*, 353 U.S. 657, evidence that Congress intended to fashion rules of production only with respect to documents dealing with communications from a govern-

ment witness to a government agent. If there is such a communication, the statute determines whether the document is producible or not; if there is none, the statute does not come into play. Given the existence of a communication, the document is producible only if it satisfies either of the definitions of "statement" contained in 18 U.S.C. 3500(e) (1) and (2). The purpose of these definitions is to make sure that only documents which are fairly attributable to the witness-communicant and not the agent-interviewer are turned over to the defense. If the document satisfies neither of these specified tests (but is, for example, merely a summary of what the witness said to the agent), the statute excludes it from production. See *Palermo* v. *United States*, 360 U.S. 343, 352.

The question here is whether to apply the statute to the situation where the witness for the United States is not a stranger, but an investigating agent himself. Although some courts have held that no documents emanating from a government agent—be they personal notes, investigative reports, or any other type of document—are dealt with by 18 U.S.C. 3500, we do not take that position. In our view, when an agent makes a report to his superiors or fellow agents of what he sees or hears, he makes a communication to an agent of the government, and his recital is within the reach of 18 U.S.C. 3500 if he becomes a government witness. By this same test, however, since personal work notes, retained by the agent himself, are not a *communication* to anyone, it is our position that they are not within the language or rationale of 18 U.S.C. 3500 and they are not required to be produced by that statute.

A. The language of 18 U.S.C. 3500 shows that Congress was dealing only with *communications* by the witness *to* the government. Subsection (a) prohibits pre-trial discovery of a statement or report "in the possession of the United States" made by a prospective government witness "to an agent of the Government." Subsection (b) speaks of production of any statement "in the possession of the United States." And subsection (e)(2) deals with "an oral statement made by said witness *to an agent of the Government*". (Emphasis added.) Undoubtedly, personal notes taken by an agent-witness are his own, and in that sense satisfy one of the objectives of the statute as being properly attributable to the witness. But since they are not communicated to anyone, the notes are not within the class of documents dealt with by the statute. The statute is concerned only with the communicated statement, report, or information.

B. The background and legislative history of 18 U.S.C. 3500 support this interpretation. In *Jencks* v. *United States,* 353 U.S. 657, the Court held that oral and written reports communicated by government witnesses to government agents, which related to their direct testimony, were subject to inspection regardless of whether the reports were inconsistent with the witnesses' trial testimony. In implementing and defining the limits of the *Jencks* principle, Congress was functioning within this same context—the production or non-production of communicated information from government witnesses to government agents. The Conference Report on the final draft of the bill italicized this requirement of communication

(H. Rept. No. 1271, 85th Cong., 1st Sess., p. 3). Congressman Celler, Chairman of the Judiciary Committee and one of the Managers on the Part of the House, plainly announced this view in final debate (103 Cong. Rec. 16738), and Senator O'Mahoney, sponsor of the legislation in the Senate so agreed in earlier debate (103 Cong. Rec. 15928).

In short, the background, language, and crucial legislative history of 18 U.S.C. 3500 show that Congress sought to govern the production of those documents which involve or refer to communications from a government witness to a government agent. It did not intend to formulate rules of inspection as to all kinds of physical documents or materials in all possible situations, including personal notes of government witnesses not communicated to the government.

C. We do not contend that, because the government witness in this case was also the government agent, all documents attributable to him are exempt from the operation of the statute. In fact, the communicated case report, containing Agent Rudd's statement of the case to his superiors, was turned over to the defense. We believe that those reports of interviews or investigations properly attributable to an agent-witness and forwarded to his superiors or colleagues, if they relate to his direct testimony, are producible under subsection (e)(1) of 18 U.S.C. 3500. We do not challenge those recent decisions holding that *communicated* reports of an agent-witness are producible under the statute. We say only that personal notes, retained by the agent and not communicated, are not within the reach of the statute where they are sought

in connection with the testimony of the agent-witness himself.

D. There is sound reason for the Congressional decision to treat uncommunicated personal notes as different from transmitted material. The highly personalized nature of note-taking, which commonly utilizes special symbols, "key words" and other private references, though tied to the subjective mental processes of the note-taker, will often be incomprehensible to a stranger. This is not to suggest that hardship in deciphering the meaning of a document would necessarily determine whether it was producible under the statute or not. It does suggest, however, that when the note-taker-witness has not indicated his belief that his notes are intelligible to others by communicating them to others for their perusal and use, they do not rise to the level of "statements" within the coverage of the statute, even though transmitted notes would be producible as of right under the statute.

II

On cross-examination of Agent Rudd, it was shown that, before trial, he had referred to his notes in order to refresh his recollection. The use of the notes in this manner brings into this case the question of whether the notes were producible as material utilized by a witness to refresh his recollection—even though they were not producible as of right under 18 U.S.C. 3500.

Until *Jencks* v. *United States,* 353 U.S. 657, it was thought settled in *Goldman* v. *United States,* 316 U.S. 129, 132, that, as to material used to refresh recollec-

ore trial, inspection was a matter of discre-
h the trial judge. Undeniably, in the circum-
dealt with by *Jencks*, now governed by the
ıre of 18 U.S.C. 3500—requiring certain ma-
to be produced as of right—the *Goldman* rule
cretion no longer exists. However, we do not
that the rule of discretion for materials used
resh recollection was undermined by *Jencks*, or
U.S.C. 3500, where the document sought is not
cible under the statute as of right.

his view, the court below (which rejected the
nt that the statute governed production of
Rudd's notes) applied the *Goldman* doctrine,
l that there was no abuse of discretion since
ıse had been allowed to examine the complete
port. Considered in this light—as a matter of
tion—the court of appeals was correct in up-
ıg the trial court's refusal to turn over the notes
s case.

III

uming *arguendo* that Agent Rudd's notes should
been turned over to the defense, failure to order
production was harmless error. The complete
report, including what Agent Rudd would him-
testify, was turned over to the defense. And an
ination of that report reveals that it was pre-
d with the aid of his notes and encompasses their
ıtial substance. The report is almost identical
ssential respects with Agent Rudd's direct testi-
y concerning his interview with petitioner. Since
d testified that he had refreshed his recollection
ı these notes, it seems clear that his statement in

the case report is the formal expression and recording of the notes.

This case is therefore within the rationale of *Rosenberg* v. *United States,* 360 U.S. 367, where it was held that the failure to turn over to the defense the statement of the witness was not prejudicial error since the defense had obtained the same information by other means. The situation here is comparable since the defense was in possession of the complete case report, containing the same information now sought; petitioner could not have been prejudiced by the refusal to allow him to inspect the work notes.

ARGUMENT

After Agent Rudd had testified as a witness for the government, his entire case report, including his report of his interview with petitioner, was turned over to the defense (*supra,* p. 10). The papers which were not ordered produced were the personal working notes of the agent, which had not been communicated to other agents or to Rudd's superiors as his "statement" of the case. The question here is whether petitioner was entitled as of right to production of those notes. It is our position, discussed in Point I, that such uncommunicated work notes are not a "statement" of the witness under 18 U.S.C. 3500 and therefore are not subject to production under the statute. In Point II, we show that, since they were used to refresh the recollection of the witness before trial, the production of the notes was within the discretion of the trial judge under *Goldman* v. *United States,* 316 U.S. 129, and that the refusal to order their production in this case

was not an abuse of discretion in view of the fact that the full case report was turned over to the defense. In Point III, we show that in the light of the turning over of the case report, non-production of the notes, even if it was error, was not prejudicial and does not call for a new trial.

I. The personal notes of a government agent which are not communicated to anyone are not within the reach of 18 U.S.C. 3500 and therefore are not subject to production under that statute

18 U.S.C. 3500(b), *supra*, pp. 2–3, provides that, after a witness called by the United States has testified on direct examination, the court must, on motion of the defendant, direct that there be turned over to the defendant "any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." The term "statement" is defined in subsection (e) as a written statement "signed, or otherwise adopted or approved" by the witness, or a recording or transcription of a "substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

It is evident both from the wording of the statute and its enactment after the decision of this Court in *Jencks* v. *United States*, 353 U.S. 657, that Congress was thinking primarily of the situation where the witness for the United States is someone other than a government investigator who has, during the course of investigation, made statements to a government investigator which are part of the government files. In

that situation, it is the record of the witness' communication to the agent that the defense is seeking to inspect. Unless there is such a communication, there is no record of it and therefore no document the defense could inspect. In other words, only when there is some communicated utterance of a prospective government witness to a government agent does the statute come into play. Given the existence of such a document (one which purports to deal with a communication from a government witness to a government agent), the inquiry is whether the document is fairly ascribable to the witness-communicant, or to the agent-interviewer. To decide this, the statute establishes two tests: (1) if the document is signed, adopted or otherwise approved by the witness, it is producible as his "statement" under 18 U.S.C. 3500(e)(1), and (2) if not so approved or adopted, it is nonetheless rendered producible by subsection (e)(2), if shown to be a substantially verbatim contemporaneous recordation of the witness' oral communication to the agent. If the record of the communication fits neither of these definitions, however, but is only a summary of what the witness told the agent it is excluded from inspection. It was the intention of Congress that the witness should be impeached only by a recording of the communication which could be said accurately to reflect his own language. *Palmero* v. *United States*, 360 U.S. 343, 352.

The problem here is how to apply the words and spirit of the statute to the situation where the witness for the United States is not a stranger, but the investigating agent himself. In that case it could be

said that there could be no statement of "a government witness * * * *made to an agent of the Government*" (emphasis added), since the government witness is the government agent; he is the recipient, not the donor, of recorded information. For this reason it might be argued, and some courts appear to have held, that documents emanating from the agent—whether they be notes, reports, or any other type of document—are freed from production by 18 U.S.C. 3500.*

We do not take that position. As indicated at the oral argument of *Palermo, supra,* and *Lev* v. *United States,* 360 U.S. 470, we think that, insofar as a government agent-witness makes a report of what he sees and hears, he does make a communication to an agent of the government (his superiors or colleagues within the government), and that such a report falls within the language and rationale of 18 U.S.C. 3500. Personal notes for one's own use, however, are not a communication to anyone. It is our view that such uncommunicated work-notes are not within either the letter or purpose of the production requirements of 18 U.S.C. 3500. Our view, in short, is that production of such notes cannot be demanded as of right. Both the language and the legislative history of 18 U.S.C. 3500 show that it deals only with information *communicated* by the witness.

A. The language of the statute as a whole and in detail shows that it was dealing with a record of

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* See *Clancy* v. *United States,* C.A. 7, No. 12,815, decided March 24, 1960; *Johnson* v. *United States,* 269 F. 2d 72, 74 (C.A. 10); *United States* v. *Franklin,* 170 F. Supp. 503, 506 (N.D. Ohio); cf. *United States* v. *Moia,* 251 F. 2d 255, 257 (C.A. 2).

information which had been communicated by the witness to the government. Thus, subsection (a) prohibits pretrial discovery of a statement or report "in the possession of the United States" which was made by a prospective government witness "to an agent of the Government." Similarly, subsection (b) speaks of production of any statement "in the possession of the United States." And the definition of "statement" in subsection (e)(2), dealing with recordings and transcriptions of oral statements, refers to "an oral statement made by said witness *to an agent of the Government*" (emphasis added).

Petitioner places his emphasis (Pet. Br. 10–13) on the definition in subsection (e)(1) that "statement" includes a "written statement made by said witness and signed or otherwise adopted or approved by him". Rather than supporting petitioner's view, we think that provision strengthens ours. Its critical requirement is that the witness, by some affirmative act on his part, acknowledge to another his responsibility for the document.[7] While the primary reason for requiring such formal approval is to make sure that what is produced is the witness' own declaration, we think the language is also indicative of the general statutory scheme that, in order to be a statement governed by the statute, the document must purport to be a communication of the witness to another. Significantly, the subsection does not include a document merely because it is in the witness' own handwriting (as are

[7] There is no doubt that personal notes retained by a witness for the government who is not a government employee would *not* be producible under 18 U.S.C. 3500.

personal notes), but requires that it be *signed* or otherwise *adopted* or *approved* by him. A person does not normally sign or otherwise adopt or approve his own working notes when he makes them for his own personal perusal and use. He merely writes down some observations. Only when the notes are prepared or expanded for transmittal or publication to another is there any reason for such acknowledgement of authorship. No doubt, the notes are the agent's own, and in that sense they meet one of the objectives of the statute, as being attributable to the witness. But they do not fall within the class of documents which the statute embraces because they are not an utterance communicated to anyone; it is with the *communicated* utterance that the statute is concerned. As we discuss *infra*, pp. 29–31, personal notes made at an interview for the purpose of preparing a report do not have the authority of a communicated statement such as the statute envisages.

B. The general background and legislative history of 18 U.S.C. 3500 support this interpretation. The avowed purpose of the statute was to set definite guide lines for the trial courts in implementing the basic holding in *Jencks* v. *United States*, 353 U.S. 657, by a precise clarification of the appropriate reach of that decision. See, *e.g.*, S. Rept. No. 569, 85th Cong. 1st Sess. p. 2; S. Rept. No. 981, 85th Cong. 1st Sess. p. 3; H. Rept. No. 700, 85th Cong. 1st Sess. p. 2. In *Jencks*, this Court decided that oral and written reports communicated by government witnesses Ford and Matusow to the Federal Bureau of Investigation which related to the subject matter of their direct

testimony were to be turned over to the defense irrespective of whether the reports contained material inconsistent with the witnesses' trial testimony. The Court was thus dealing solely with the question of the production of statements, whether written or oral, made by government witnesses to government agents.* In implementing and defining the limits of the *Jencks* rule, Congress was acting within this general area.

This is borne out by the Conference Report on the final draft of the bill, in which the Managers on the Part of the House deemed it necessary to italicize this requirement of communication to an agent. As they said (H. Rept. No. 1271, 85th Cong. 1st Sess. p. 3):

> The changes agreed upon by the conferees * * * (2) limit the types of statements and reports which come under the provisions of the bill to statements of Government witnesses or prospective witnesses, other than the defendant, *made to an agent of the Government* * * * [emphasis in original].

Favorably discussing this report, Congressman Celler, Chairman of the Judiciary Committee and one of the Managers on the Part of the House, observed that the Act limited itself to statements "of Government witnesses or prospective Government witnesses *made to agents of the Government* and no other kinds of statements, documents, and so forth" (103 Cong. Rec. 16738, emphasis added). His remarks in this

* Similarily, *Gordon* v. *United States*, 344 U.S. 414, referred to approvingly in *Jencks* (353 U.S. at 666–667), dealt also with the production of a statement made by a government witness to a government agent.

connection are particularly significant since in earlier debate he had sought to amend the House bill (H.R. 7915) because of his belief that its language could be interpreted as covering the subject of the production of all documents attributable in some way to the witness, and that while statements made by prospective government witnesses to agents of the government would be producible, if truly attributable to the witness, all other documents connected with the witness would be excluded from production altogether by the bill, whether communicated to the government or not.* In accord with his understanding, he sought to broaden the area of production under the statute by additionally permitting production, in the court's discretion, of all "books, records, papers, or documents" relied upon by the witness as a record of his past recollection, or as a means to refresh his recollection (103 Cong. Rec. 16125). While his amendment was defeated (*id.* at 16129), the provision of the House bill that Congressman Celler found offensive was deleted in Conference. It was because the Conference bill excised the offending passage and made plain that the Act applied to statements or what purported to be statements of government witnesses to government agents, and did not deal with other documents con-

*He so interpreted paragraph (a) of that bill which provided that: "In any criminal prosecution brought by the United States, any rule of court or procedure to the contrary notwithstanding, no statement or report of any prospective witness or person other than a defendant which is in the possession of the United States shall be the subject of subpena, discovery, or inspection, except as provided in paragraph (b) of this section." See his comments at 103 Cong. Rec. 16114, 16119-16120, 16127-16128.

nected with the witness, that Congressman Celler relented in his objections and recommended its passage. Indeed, such limited coverage was the original understanding of Senator O'Mahoney, sponsor of the legislation in the Senate, who in earlier debate had observed: "[W]e are dealing with one character of statements, and one character only, namely, statements made by Government witnesses who have been called and who have testified before the court, *who have made statements to a Government agent.* That is all." (103 Cong. Rec. 15928; emphasis added).

For present purposes, the crux of the background, language, and legislative history of 18 U.S.C. 3500 is that Congress aimed to govern the subject of the production of those documents which purport to record or deal with communications from a government witness to a government agent. If examination of the document reveals that it is properly attributable to the witness, the statute renders that part of it which relates to the witness' direct testimony producible; if it proves instead not to be properly attributable to the witness (*e.g.*, a summary containing the impressions and interpretations of the interviewer), then the statute renders it non-producible. Congress did not further intend to establish rules of inspection in all possible situations as to all kinds of documents connected with witnesses, even government witnesses. Since personal, non-communicated notes have not been communicated to the government, their production is not required as of right under the statute.[10]

[10] Whether production was required under any other principle of law is discussed, *infra*, pp. 31*ff*.

C. As noted at the outset, we are not contending, as petitioner seems to assume (Pet. Br. 14–21), that because the government witness in this case was also a government agent all documents which the agent prepared relating to his direct testimony were immune from the operation of the statute. On the contrary, the government turned over to the defense the case report of Agent Rudd, which contained his statement of the case transmitted to his superiors (*supra*, p. 10). We believe that, just as in the case of any other government witness, those reports of interviews or investigations prepared or otherwise approved by an agent-witness and transmitted for the information and perusal of his superiors or colleagues, which relate to his direct testimony, are his "statement" and are subject to production under subsection (e)(1). Consequently, we have no quarrel with cases like *Holmes* v. *United States*, 271 F. 2d 635, 637 (C.A. 4), holding that "memoranda" and "reports" of an agent-witness concerning his investigation of the case and his conversations with the defendant about which he testified at trial were producible as his statement under 18 U.S.C. 3500, or with other recent decisions to the effect that communicated reports or memoranda of an agent-witness are producible under the statute.[11] We think there is

[11] See, *e.g.*, *United States* v. *O'Connor*, 273 F. 2d 358, 360–361 (C.A. 2); *Short* v. *United States*, 271 F. 2d 73, 76–77 (C.A. 9), certiorari denied, 361 U.S. 948; *United States* v. *Prince*, 264 F. 2d 850, 851–852 (C.A. 3); *United States* v. *De Lucia*, 262 F. 2d 610, 614, certiorari denied, 359 U.S. 1000; *United States* v. *Soto*, 256 F. 2d 729, 734–735 (C.A. 7); cf. *Williamson* v. *United States*, 272 F. 2d 495, 498 (C.A. 5); *United States* v. *David*, 168

a meaningful distinction between documents prepared for communication, or communicated, by the agent-witness (memoranda and reports compiled for the examination of his superiors and colleagues), and personal non-transmitted notes written by the agent for his private use as a tool to aid his memory.[12]

Nor do we have any quarrel with the rationale of *United States* v. *Papworth*, 156 F. Supp. 842, 853–

F. Supp. 269, 271 (N.D. Ohio), affirmed, 264 F. 2d 248 (C.A. 6), certiorari denied, 359 U.S. 967.

[12] There are divergent views in some recent cases on this point. The Fifth Circuit, on facts similar to those in the instant case, sustained the view that non-transmitted personal notes of an agent-witness are not within the reach of 18 U.S.C. 3500. *Tillman* v. *United States*, 268 F. 2d 422, 424–426. See also *Badon* v. *United States*, 269 F. 2d 75, 80–83 (C.A. 5). On the other hand, in *Bradford* v. *United States*, 271 F. 2d 58, 65–69 (C.A. 9), during a pre-*Jencks* trial, the trial court, after *in camera* inspection, refused to turn over to the defense formal reports of the agent-witness, as well as the agent's private notes, on the ground that these documents contained nothing inconsistent with his direct testimony. In reversing, the Ninth Circuit did not inquire whether the notes were communications properly to be classified with the agent's formal reports of the case, but, broadly applying the *Jencks* decision, lumped all the documents under one heading and remanded the case for a new trial at which the procedures of 18 U.S.C. 3500 were to apply. See, also, *Rodgers* v. *United States*, 267 F. 2d 79, 89–91 (C.A. 9). Since, in each of these cases, the agent-witness had referred to his notes in order to refresh his recollection, as we discuss *infra* pp. 31*ff*, the question of production actually turned on different considerations from those dealt with by the courts.

At the other end of the spectrum, is *Johnson* v. *United States*, 269 F. 2d 72, 74, where the Tenth Circuit held that even a formal memorandum transmitted by the agent-witness as his report of the case was not a producible statement within the statute, but rather the agent's "interpretations and impressions" of what the defendant told him. See also *Clancy* v. *United States*, C.A. 7, No. 12,815, decided March 21, 1960.

854 (N.D. Tex.), affirmed, 256 F. 2d 125 (C.A. 5), certiorari denied, 358 U.S. 854, where, after an *in camera* inspection, the trial court held that if a non-witness agent made contemporaneous substantially verbatim notes of an interview with the government witness, such notes were producible under the statute as the statement *of the witness,* for there the notes were *not* ordered produced as the statement *of the agent,* but rather as a full and accurate record of information communicated to the agent by the government witness. Cf. *Holmes* v. *United States,* 271 F. 2d 635, 638 (C.A. 4). Similarly, we do not read the opinion in *McGill* v. *United States,* 270 F. 2d 329 (C.A. D.C.), certiorari denied on other issues, February 29, 1960, No. 324 Misc., this Term, as holding that the production of notes sought as the statement of the agent-witness is governed by 18 U.S.C. 3500 and excluded from production by that statute. Rather, as we understand that case, where the agent testified on cross-examination that he had taken notes of his conversations with *other government witnesses,* the court of appeals considered that the demand for the notes was predicated on the theory that the notes were the "statements" of these *other witnesses* and not sought as the statement of the agent herself. Proceeding under that hypothesis, the court was correct in ruling that these communications were within the reach of the statute and not producible because not fairly attributible to those witnesses.[13] Cf. *Stanley* v. *United States,* 249 F. 2d 64, 66 (C.A. 6).

[13] In the petition for certiorari, there was no challenge made to the production ruling.

Nor, again, do we find inconsistent with our position the basic holding of the Second Circuit in *National Labor Relations Board* v. *Adhesive Products Corporation,* 258 F. 2d 403, also relied upon by petitioner (Pet. Br. 23). In that case, the court held that, under the *Jencks* decision, the trial tribunal had no discretion to withhold from the defense a communication by the witness to the government which related to the subject matter of his direct testimony and which he had used to refresh his recollection before he testified, even though he did not refer to it while on the stand. There can be no doubt that, irrespective of whether the witness had referred to this document to refresh his recollection or not, since it was his "statement" it would be producible under the *Jencks* decision and now under 18 U.S.C. 3500. And, as we discuss *infra,* pp. 31*ff*, in such circumstances, it would make no difference on the issue of production whether the witness had referred to this type of document to refresh his recollection or not.

D. The short of our position is that where the government agent-witness, in interviewing the defendant or conducting his investigation, takes notes for his own personal use and does not transmit those notes to his superiors or fellow agents as his report (or part of his report)—which is the situation in the present case—such notes are not within 18 U.S.C. 3500, and not producible thereunder when the agent takes the stand. There is a sound basis for Congress' having treated such uncommunicated personal notes as in a different category from statements or reports communicated by the agent-witness for the use or information of others.

is common knowledge that note-taking for the ses of personal recollection is a highly indi- stic matter substantially affected by the habits, ular practice, intellect, and psychological up of the note-taker. It is usual for the writer ploy symbols, special abbreviations, "key words," other private references which, while tied to his ctive thought processes and helpful in aiding him call past events, will often be incomprehensible stranger. For some note-takers, one word or bol may serve to recall a whole sequence of ideas; others, personal notes may approach a complete t-hand record. Some notes seek to cover, by word ymbol, everything that the note-taker wishes to mber; others jot down only selected items, leaving heir memory to recall the rest.

do not mean to suggest that difficulty in de- ering the meaning of a document would neces- determine whether it is producible under the te or not. We do think, however, that only when ote-taker-witness has indicated that his personal s are intelligible to others by conveying the notes to rs for their information or use—thus suggesting in themselves the notes have meaning for others, sufficiently reveal what he wishes to convey so they should be read"—should notes be held within tatute, whether or not made by a federal agent- s. It is only then that the notes take on the char- of "statements" intended to be understood and

e at a trial of uncommunicated personal notes, for pur- of cross-examination, is apt to involve time-consuming rial-confusing difficulties of collateral investigatio. nto eaning of the notes, the witness' note-taking habits, etc.

relied upon by others. Personal notes made by a government witness not employed by the government would clearly not be producible under the statute if not communicated or conveyed to the government (*supra*, pp. 20–22); the uncommunicated personal notes of a government agent-witness are in the same class of private memory-joggers intended for the individual use of the person.[15]

II. Petitioner was not entitled as a matter of right to inspect Agent Rudd's notes under any other rule of inspection

It was brought out during the cross-examination of Agent Rudd that before trial he had referred to his notes in order to refresh his recollection (R. 88). As we have discussed in Point I, *supra*, that fact has no relevance on the question of whether petitioner had a right of inspection pursuant to 18 U.S.C. 3500. If notes relating to his direct testimony had been transmitted by Rudd to his superiors, then they would have been producible under 18 U.S.C. 3500(e)(1), regardless of whether he had ever looked at them again. Conversely, that he had looked at them before his trial testimony does not bring them within the reach of the statute absent the essential requirement of communication and transmittal (see *supra*, pp. 18–31). However, the use of notes by the agent-witness for recollection purposes does inject into the case the issue of whether the notes were producible under an entirely different doctrine of inspection, *i.e.*, whether the notes should have been produced under the special rule deal-

[15] Normally, such uncommunicated notes do not become part of government files and may be disposed of at will by the government employee.

ing with material used by a witness to refresh his recollection.

Until *Jencks* v. *United States,* 353 U.S. 657, the general federal rule where a witness had, before trial, refreshed his recollection by reference to notes or memoranda was thought settled by this Court's decision in *Goldman* v. *United States,* 316 U.S. 129. As there announced (p. 132):

> We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but are also part of the Government's files, a large discretion must be allowed the trial judge. We are unwilling to hold that the discretion was abused in this case.

See, also *United States* v. *Socony Vacuum Oil Co.,* 310 U.S. 150, 232–234.[16]

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[16] In *Lennon* v. *United States,* 20 F. 2d 490, 493–494 (C.A. 8), the rationale of the rule was explained thus:

"* * * This right is accorded [inspection of any paper or memorandum used by a witness while on the stand], in order that [the cross-examiner] may ascertain whether the paper or memorandum used has any legitimate tendency to bring the fact in controversy to the mind of the witness, and in order that he may be in a position to cross-examine as to the testimony given and thereby to test the candor and integrity of the witness * * *.

"But in this case * * * [t]he paper was not used while the witness was on the stand * * *. Witnesses frequently refresh their memories before going into court, by referring to papers in their possession which are not taken into court; and where they rely on their recollection of the facts, * * * it is not necessary that the writing be produced."

See, also, *Little* v. *United States,* 93 F. 2d 401, 406–407 (C.A. 8), certiorari denied, 303 U.S. 644.

In *Jencks*, this Court stated (353 U.S. at 668):

> This Court held in *Goldman* v. *United States*, 316 U.S. 129, 132, that the trial judge had discretion to deny inspection when the witness "* * * does not use his notes or memoranda [relating to his testimony] in court * * *" We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial.

In his dissent in *Jencks* (353 U.S. at 680), Mr. Justice Clark observed that *Goldman* was "*contra* to the rule announced today." Mr. Justice Burton, concurring with the Court (353 U.S. at 672, 674–675), also stated his belief that *Goldman* could not be squared with the majority rule in *Jencks*.

There is no doubt that in the circumstances dealt with in *Jencks* (the production of a statement made by a prospective government witness to agents of the government)—now governed by the procedure adopted in 18 U.S.C. 3500—the *Goldman* rule no longer has any vitality. As pointed out above, regardless of whether the witness examines his statement before he testifies or not, if it is a statement under 18 U.S.C. 3500 it is subject to production as of right. However, we do not believe that the rule of discretion announced in *Goldman for materials used to refresh recollection* was undermined by *Jencks*, or 18 U.S.C. 3500, where the document sought is not one producible

under the statute. Recollection may be refreshed by all sorts of documents, not necessarily made by (or properly attributable to) the witness himself and not necessarily communicated to the government. Where production is sought on the basis that the witness actually used it to refresh his recollection, the rule of discretion announced in *Goldman* still has force and effect for a document outside the scope of Section 3500.

To make our point more graphically, let us assume a criminal case where, before trial, the government witness had examined a photograph taken by another in order to refresh his recollection. The photograph is clearly not a statement of the witness under 18 U.S.C. 3500. And if, upon cross-examination, the defense sought to examine the photograph, its producibility would not in our view depend upon whether it fits the definitions of 18 U.S.C. 3500. If the statute alone governs, there would be an unyielding rule precluding the photograph's production in all instances, for if it is not a statement of the witness (yet its producibility is governed only by the statute) it would be excluded from production altogether (see *Palermo* v. *United States*, 360 U.S. 343, 350–351) even though used by the witness, on the stand or before testifying, to refresh his recollection.

We believe that the proper approach in such circumstances is to recognize that 18 U.S.C. 3500 has nothing to do with the question of the production of such a photograph—or other materials outside the scope of 18 U.S.C. 3500—used to refresh recollection, and that the problem of whether the defense should be

entitled to see it or not rests within the sound discretion of the trial judge under the rationale of *Goldman*.[17] In *Lambert* v. *United States*, 261 F. 2d 799 (C.A. 5), this rationale was applied in deciding the question of the production of an F.B.I. report not prepared by the witness (a city detective), but used by him (before taking the stand) to refresh his recollection of the events. The court stated (p. 802):

> The statute passed to meet the Jencks decision, 18 U.S.C.A. § 3500, confines the right to inspect statements or reports in the possession of the United States to those which were made by a Government witness. In the present case, appellant's counsel sought to examine the full F.B.I. report made by Agent Bush, and not joined in by the witness, City Detective Richmond.

Because the detective had used the report, the court then applied the rationale of discretion announced in *Goldman* (p. 802):

> The Goldman case was not overruled in Jencks * * *. We are unwilling to hold that the discretion of the district court was abused in this case.

On this same view, the court below rejected in this case the contention that the statute governed produc-

[17] Of course, the argument we are making applies to materials *used to refresh recollection* and *not* to documents, not producible under 18 U.S.C. 3500, which have not been so used to refresh recollection. As *Palermo* holds, the latter materials are not producible at all, and the judge has no discretion to order their production.

tion of Agent Rudd's notes, but found that the *Goldman* rule applied and held that there was no abuse of discretion in the trial court's refusal to order the notes produced since the defense had been permitted to inspect the full case report containing Agent Rudd's complete statement of his interview with petitioner (R. 138–146). 261 F. 2d at 806–807. Considered in this light—as a question of discretion for the trial judge—the court of appeals was correct in upholding the trial court's ruling. Agent Rudd did not use the notes in court. The testimony of Agent Waters regarding the substance of Rudd's interviews corroborated Rudd's testimony in all essential respects. Petitioner knew of Rudd's testimony at the prior trial. And, finally, the defense was given the complete case report, containing Rudd's statement of the case which, as we show in Point III, showed on its face that it embodied the contents of the notes.

III. Even if it be assumed *arguendo* that Rudd's notes were subject to production, failure to order their production did not constitute reversible error

Even if it is assumed that failure to require production of the notes was error, it was not prejudicial. As noted *supra*, p. 10, during the trial the government turned over to the defense Agent Rudd's complete case report. This report (some 22 pages) not only covers in minute detail every phase of the government's case, including a narrative statement, a list of exhibits and a list of witnesses and their anticipated testimony, but further recites in detail what Agent Rudd himself would testify concerning his interviews with petitioner during his investigation

(R. 138–146).[18] An analysis of Rudd's statement in this report reveals that it was prepared by the agent with the aid of his notes and encompasses the essential substance of these notes.

For example, Rudd testified at the trial that petitioner "immediately" admitted during the interview that he had prepared the prescription for "those addicts"—"old opium and heroin and morphine users" (R. 57). Rudd's statement in the case report recites, almost identically, that petitioner "voluntarily and spontaneously" stated that he left prescriptions with "those addicts" and that they had used "opium, heroin, morphine and dilaudid" (R. 139–140). Again, both in his direct testimony and in this statement, Rudd reports that petitioner thought it was "wonderful" that these persons could, by using his prescriptions, keep working and not have to go out on the street to buy heroin or a derivative (R. 67–68; 140). Moreover, both Rudd's trial testimony and his formal report similarly recounted petitioner's explanation of the arrangements relating to the prescriptions before his European trip (compare R. 68–69 with R. 140–141).[19] Since Rudd testified that prior to trial he

[18] Significantly, petitioner failed to use the detailed account of Rudd's interview with petitioner, or any other part of the report, in an attempt to impeach Rudd's testimony.

[19] Furthermore, in his testimony at the trial, Agent Rudd stated that, when he asked petitioner why he gave twenty-four tablets on one prescription, petitioner responded "[b]ecause they told me they needed it" (R. 68). In detailing similar questioning in his report, Rudd observed that he asked petitioner whether certain of these addicts could be withdrawn from methadon without suffering ill effects and petitioner replied: "It is possible, but they say they need it" (R. 142–143).

had refreshed his recollection from his notes, it seems clear, particularly as to his interview with petitioner, that his statement in the case report is the formal expression and recording of the notes. Moreover, Agent Water's testimony at trial fully squared with Rudd's version of what petitioner had told him (R. 97–100).

The situation here is parallel to that in *Rosenberg* v. *United States*, 360 U.S. 367. In that case this Court held that, although a letter written by the witness to the Assistant United States Attorney should have been turned over to the defendant under the terms of 18 U.S.C. 3500, failure to do so was not prejudicial error since the defense had obtained the very same information by other means. As this Court put it (p. 371): "[W]hen the very same information was possessed by defendant's counsel as would have been available were error not committed, it would offend common sense and the fair administration of justice to order a new trial". So it can be said here that, since the defense was possessed of the complete case report, which contained essentially the same information now sought, the petitioner could not have been prejudiced by his lack of opportunity to inspect Agent Rudd's notes.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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